

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**DEBTOR’S REPLY TO SECRETARY OF LABOR’S OBJECTION TO DEBTOR’S
MOTION FOR ORDER APPROVING SETTLEMENT**

F.C. Acquisition Corporation (“Debtor” or “Intrepid”) seeks authority to settle a dispute with another Chapter 11 debtor, Medshares, Inc. (“Medshares”) and others over entitlement to certain insurance premium refunds currently being administered in the Medshares’ bankruptcy case (the “Settlement”). The Secretary of Labor, U.S. Department of Labor (the “DOL”) has filed an objection based on issues involving Medshares’ former health plan (the “Objection”). The DOL’s Objection should be overruled because:

- (a) The Medshares’ Plan about which the DOL complains has no relation to the insurance premium refunds that are the subject of the Settlement.
- (b) The DOL may or may not have a claim in the Intrepid case, but any such claim is not relevant to or affected by the Settlement.
- (c) The DOL has no special rights as to the Settlement funds and has no valid basis for objecting to the Settlement.

Factual Background

1. In the Objection, the DOL misstates and mischaracterizes the facts regarding the Intrepid-Medshares’ sales transaction and its aftermath. The relevant facts of that transaction and the resulting dispute are set out in the Affidavit of Lisa M. Montague filed herewith. They

are briefly summarized here solely for the purpose of correcting the DOL's allegations that Intrepid wrongly "seized" funds to which it was not entitled. In fact, none of the DOL's allegations are relevant to the Settlement, and they should be disregarded for the purposes of approving the Settlement.

2. Medshares maintained a "cafeteria" employee benefit plan. One element was a self-funded medical plan administered by Fiserv (the "Fiserv Plan"). This is the plan referenced in the Objection.

3. In the Medshares' Chapter 11, Intrepid purchased certain Medshares' assets under Bankruptcy Code § 363, as of July 1, 2003. Among the assets purchased were all of Medshares' accounts. The Fiserv Plan was not purchased or assumed as part of the sale.

4. After the asset purchase, the part of the Medshares business Intrepid purchased was consolidated under Intrepid's existing insurance policies, and Medshares cancelled its liability insurance and workers compensation insurance, among other things. As a result, unearned premiums for the liability insurance and the workers compensation insurance were refunded to Medshares. None of the cancelled policies or premium refunds related in any way to the Fiserv Plan.

5. Intrepid and Medshares both asserted the right to these premium refunds under differing interpretations of the Asset Purchase Agreement. It is this dispute that is the subject of the Settlement.

6. Although the DOL does not explain how any of its allegations relate to the Settlement, it alleges that Intrepid took funds belonging to the Fiserv Plan. This is incorrect (and irrelevant to this Settlement). By purchasing Medshares' accounts, Intrepid became the owner of all Medshares' bank accounts. One such account at First Tennessee Bank was named

“Employee Benefit Plan Account.” This was not a trust account or an account administered in any way by the Department of Labor. Rather, it was established after the Medshares’ Chapter 11 commenced, to separate from the general operating account amounts to be utilized to pay several different types of employee benefits, including benefits payable under the Fiserv Plan and others. The Medshares bankruptcy court approved Intrepid’s bid to purchase the assets, including accounts, and the Asset Purchase Agreement negotiated and prepared in accordance with that approval gave Intrepid ownership of this account and others. On day after the initial closing, on July 1, 2003, and not before that date, Intrepid moved this asset to its own accounts.

7. After the asset sale, many Medshares’ employees were employed by Intrepid, and the Fiserv Plan continued to cover those employees until it was terminated December 31, 2003. Although Intrepid did not purchase or assume the Fiserv Plan, Intrepid did continue to pay Fiserv for administration and to pay medical claims during this period. A dispute exists regarding Intrepid’s liability to former Medshares employees and to Fiserv. Notwithstanding the dispute, Intrepid scheduled Fiserv as a creditor and Fiserv filed a proof of claim. Intrepid is making periodic payments to Fiserv, currently at the rate of up to \$50,000 per week, for payment of the employee medical claims, as authorized by this Court’s order regarding employee benefits early in the case.

8. Intrepid denies that the DOL has any claim in the case, beyond the claim filed by Fiserv and currently being paid by Intrepid. In any event, any such claim has no relationship to the Settlement.

9. The dispute between Intrepid and Medshare’s over entitlement to the refunded insurance premiums has existed for at least a year and the parties have now reached agreement

egarding the settlement. Intrepid intends to use the Settlement funds in the operation of its business and, thereby, for the benefit of all its creditors.

Argument

10. In its Objection, the DOL makes no attempt to relate the current proposed Settlement to the alleged under-funding of the Fiserv Plan. No relation exists. The DOL makes no attempt to explain why the Settlement should be delayed. No reason for delay exists. The DOL makes no argument that the Settlement is not in the best interest of the estates. No such argument exists. The DOL is at most a creditor--and only arguably a creditor at that--with no particular interest in the Settlement funds at issue. There is no basis for its Objection, and the Objection should be overruled.

A. The DOL's Issues Regarding the Fiserv Plan Have No Relation To The Settlement.

11. The DOL makes (erroneous) factual allegations about Intrepid and the Fiserv Plan, but does not attempt to relate them to the Settlement. The Settlement involves funds refunded on account of liability and workers' compensation insurance cancellation. They do not relate to Fiserv or the Fiserv Plan. The DOL has no particular claim to the insurance premium refunds, and there is no reason Medshares and Intrepid should not divide those funds as they have agreed.

12. The DOL may or may not have a claim against Intrepid arising out of the Fiserv Plan. If it does, it is only a creditor, with no more interest in the Settlement monies than any other creditor. The facts surrounding the Fiserv Plan are complicated and disputed, but there can be no dispute but they bear no relation to the insurance premium refund monies or to the Settlement. Moreover, Intrepid is making weekly payments to Fiserv, also entirely unrelated to

the Settlement, which may well resolve any claims of the Fiserv plan without court intervention and without the “assistance” of the DOL.

13. The DOL has not set out any reason for objecting to the Settlement. Even if it were a creditor, the Settlement has no effect on any claim it might have. Indeed, the Settlement funds will be used for operations, which benefits all creditors. The DOL Objection here has no more weight than a general unsecured creditor objecting to a Debtor’s use of cash collateral for operations rather than for paying that creditor’s claim. It establishes no basis for denying the Debtor’s request to approve its settlement with Medshares and others. The DOL has not alleged and cannot show any relation between the Fiserv Plan and the Settlement, and its Objection must be overruled.

B. The Settlement Is in the Best Interest of the Estate and Should Be Approved.

14. Even if there were a connection between the Fiserv Plan and the Settlement, the Court should approve the Settlement without further delay because it is in the best interests of all creditors of the estates. Bankruptcy Rule 9019(a) authorizes the Bankruptcy Court to approve compromises or settlements: “On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). Approval or disapproval of a proposed settlement is committed to the discretion of the Bankruptcy Court. In re Hancock-Nelson Mercantile Co., Inc., 95 B.R. 982, 990 (Bankr. D. Minn. 1989); In re Lakeland Corp., 48 B.R. 85, 89 (Bankr. D. Minn. 1985).

15. In deciding whether to approve a settlement, the following factors must be considered:

- (a) The probability of success in any pending litigation;
- (b) The difficulties in collection of any litigated judgment;

(c) The complexities of any litigation and the expense, inconvenience, and delay necessary in attaining it; and

(d) The paramount interests of creditors.

Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929); In re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied. 469 U.S. 1207 (1985). In Minnesota, bankruptcy courts also consider whether the conclusion of the litigation promotes the integrity of the judicial system. See, In re Bates, 211 B.R. 338, 343 (Bankr. D. Minn. 1997).

16. All of these factors favor approval of the Settlement in this case. Litigating with the Medshares bankruptcy estate would not ensure that the Intrepid estates would receive a substantial share of the refunded premiums, as they do in the Settlement. The cost of such litigation would deplete both bankruptcy estates. Approval of the Settlement injects cash into the Intrepid estates for operations, to the benefit of all creditors. Finally, because settlement is favored over litigation, the integrity of the judicial system is upheld.

17. The DOL Objection fails to suggest anything to the contrary. Because the Objection fails to demonstrate or even allege any connection between the situation of which the DOL complains and the Settlement; because the DOL has no special claim to the monies that are the subject of the Settlement; and because the DOL has failed to suggest any reason why the Settlement should not be approved, the Objection of the DOL should be overruled and the Settlement should be approved.

FREDRIKSON & BYRON, P.A.

Date: September 7, 2004

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11 Bankruptcy

Intrepid U.S.A., Inc.,
and Jointly Administered Cases,

Case No. 04-40416-NCD

Case No. 04-40462-NCD

Case No. 04-40418-NCD

Debtors

Case Nos. 04-41924 – 04-41988-NCD

**AFFIDAVIT OF LISA M. MONTAGUE IN SUPPORT OF DEBTOR'S MOTION FOR
ORDER APPROVING SETTLEMENT**

Lisa M. Montague states under penalty of perjury as follows:

1. I am the General Counsel of Intrepid U.S.A., Inc. and affiliated Debtors, and as such have personal knowledge of the facts set out herein. I was general counsel of the Intrepid entities at the time of the asset purchase from Medshares, Inc. and its affiliated entities (“Medshares”) in Medshares’ Chapter 11.

2. The terms of sale are set out in the Asset Purchase Agreement dated June 30, 2003 between F.C. Acquisition Corporation and TBJG LLC and Medshares. Paragraph 2.1 of and Article 3 the Asset Purchase Agreement identify the assets purchased by Intrepid. The majority of the purchased assets included tangible personal property, accounts, and the assets specifically related to and statutorily necessary for the operation of the various local home health agencies (“Agency Seller Assets”). The Fiserv Plan¹, to the extent it could even be characterized as a Medshares’ asset, was not included in the sale.

3. By purchasing Medshares’ Agency Seller Assets, Intrepid became the owner of Medshares’ cash and bank accounts. One of those accounts was maintained at First Tennessee

¹ Capitalized terms used here have the same meaning as in the Debtor’s Reply filed herewith.

Bank and is referred to in the DOL Objection as the “Employee Benefit Plan Account.” It is my understanding that this account was established during Medshares’ Chapter 11 case to separate from its general operating account amounts originally intended to be utilized to pay, in part, several different types of employee benefits, including benefits under the Fiserv Plan and several others. The Asset Purchase Agreement, however, gave Intrepid ownership of this account. To the best of my knowledge it was not a trust account. It was not excepted from the sale of all other Medshares accounts.

4. Although I do not have personal knowledge of the following, as Intrepid’s general counsel, I oversaw generally the closing of the sale, and I understand that on the day after the closing of the Intrepid-Medshares’ asset purchase, July 1, 2003, funds in all of Medshares’ accounts were transferred to Intrepid in accordance with Intrepid’s usual and customary practice of assuming control over the assets purchased. I further understand and believe that no monies were transferred to Intrepid prior to the closing and no monies from the Medshares’ accounts were used for payment of the purchase price in association with the closing.

5. The Fiserv Plan referred to in the Objection was an employer self-funded medical plan administered by Fiserv. It was part of Medshares’ “cafeteria” type employee benefit plan program. Although Intrepid had not purchased or assumed Fiserv Plan liability, Intrepid continued to pay Fiserv for administration and to pay medical claims through Fiserv during this period for those Medshares’ employees who became employed by Intrepid after the asset sale. An ongoing dispute exists regarding the existence and extent of any Intrepid liability to Fiserv or to former Medshares’ employees under the Plan.

6. Notwithstanding the dispute, Intrepid scheduled Fiserv as a creditor and Fiserv filed a proof of claim. Intrepid is making periodic payments, currently at the rate of up to

\$50,000 per week, to Fiserv in payment of employee medical claims. It is my understanding that it is Intrepid's intent that any dispute between Intrepid and Fiserv be resolved through these payments and through negotiations which are continuing.

7. Fiserv may also have claims in the Medshares bankruptcy case. I understand from the terms of the Settlement that Medshares has agreed to utilize a portion of its share of the Settlement monies to pay previously unfunded medical claims of other former Medshares employees, but to the best of my knowledge this is a separate agreement and is not related to the *source* of the Settlement monies, which is refunded premiums not related to Fiserv or employee health benefits. I am aware of no relationship between the Fiserv situation and the Settlement currently before the Court for approval.

8. The Settlement is a compromise over entitlement to liability and workers' compensation insurance premium refunds. Some of the Medshares' locations purchased by Intrepid had ceased operations before the asset purchase and some ceased operations after the asset purchase. As a result of the cessation of operations, Medshares cancelled liability insurance and workers compensation insurance policies, and unearned premiums were refunded. Additional unearned premiums were refunded as a result of the consolidation of the operations under Intrepid's existing insurance policies. It is these premium refunds that are the subject of the Settlement.

9. Intrepid and Medshares both asserted the right to the premium refunds under differing interpretations of the Asset Purchase Agreement. This dispute has been going on since the refunds were received and has now finally been resolved in the manner set out in the Motion for Approval of the Settlement. Intrepid's share of the Settlement monies will be used in ongoing operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 7, 2004

Lisa M. Montague
Lisa M. Montague

#30130561

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Intrepid U.S.A., Inc.
Intrepid of Golden Valley, Inc.
F.C. Acquisition Corporation
Debtor

Chapter 11 Bankruptcy

Case No. 04-40416-NCD
Case No. 04-40462-NCD
Case No. 04-40418-NCD

CERTIFICATE OF SERVICE

Faye Knowles, under penalty of perjury, states that on September 7, 2004 she caused to be served the following:

Debtor's Reply to Secretary of Labor's Objection to Debtor's Motion for Order Approving Settlement, Affidavit of Lisa M. Montague in support of Debtor's Motion for Order Approving Settlement, and Certificate of Service

by sending true and correct copies thereof by facsimile to all parties on the attached list.

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Dated: September 7, 2004

/s/ Faye Knowles
Faye Knowles